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No. 09-130

Supreme Court, U.S.
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In The

Supreme Court of the United States

GAILE OWENS,

Petitioner,

vs.

JEWELL STEELE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR REHEARING

MARK E. OLIVE
Counsel of Record
LAW OFFICE OF
MARK E. OLIVE, P.A.
320 W. Jefferson Street
Tallahassee, Florida 32301
(850) 224-0004

KELLEY J. HENRY
Supervisory Assistant
Federal Public Defender

GRETCHEN L. SWIFT
Assistant Federal
Public Defender

OFFICE OF THE FEDERAL
PUBLIC DEFENDER
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for Petitioner Gaile Owens

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RULE

U.S. S. Ct. R. 10 1

PETITION FOR REHEARING

This Court should grant rehearing in light of intervening Courts of Appeals' decisions in *Banks v. Thaler*, 2009 U.S. App. LEXIS 20827 (5th Cir. Sept. 18, 2009); *United States v. Talib*, 2009 U.S. App. LEXIS 22729 (4th Cir. Oct. 16, 2009); and *Libberton v. Ryan*, 2009 U.S. App. LEXIS 21633 (9th Cir. Oct. 2, 2009).

* * *

The Sixth Circuit has concluded that even though the prosecution was required to disclose exculpatory love letters between the victim and his paramour, Ms. Owens suffered no "prejudice" (i.e. it was not "material" to Ms. Owens's death sentence), because Ms. Owens could have presented other proof of her husband's affair, including testimony from the paramour herself. As Ms. Owens has explained in her petition for writ of certiorari, such an analysis conflicts directly with *Brady* and its progeny. Indeed, the *Brady* materiality analysis doesn't ask what a defendant still might have done *without* the exculpatory evidence withheld by the prosecution, but what a defendant could have done *with* it.

Intervening decisions from various Courts of Appeals confirm the Sixth Circuit's clear error in interpreting the *Brady*'s materiality prong. These most recent Court of Appeals' cases demonstrate that the Sixth Circuit's analysis is at odds with *Brady* and that certiorari is warranted in order to insure that *Brady* is applied uniformly throughout the circuits. U.S. S. Ct. R. 10.

For example, in *Banks v. Thaler*, 2009 U.S. App. LEXIS 20827 (5th Cir. Sept. 18, 2009) the Fifth Circuit properly acknowledged that when evaluating the materiality of withheld exculpatory documents, a reviewing court must evaluate how that evidence "could . . . have been used" by the petitioner at trial (*Id.* at *73), with both the "the usefulness to" the petitioner and the nature of the parties' "closing arguments" being the touchstones of such analysis. *Id.* at *81. Applying that framework, the Fifth Circuit considered how Banks could have used the withheld evidence at his trial. That is the proper analysis, for that is what *Brady* requires.

Rather than considering the effect of the withheld evidence on Ms. Owens's capital sentencing proceeding, the Sixth Circuit instead focused upon what Ms. Owens could have shown at her sentencing despite the prosecution's admitted failure to disclose the highly exculpatory love letters. Had the Sixth Circuit applied the proper analysis used in *Banks*, they would have had to conclude that the evidence was material. Because the love letters were admissible at sentencing, they were highly mitigating because they showed the mental anguish inflicted upon Ms. Owens by the victim, and they demonstrated that the prosecution's claimed dastardly motive for the killing – insurance money – was not true. The analysis and outcomes in *Banks* and *Owens* are at odds, confirming the need for this Court to grant certiorari.

Similarly, in *United States v. Talib*, 2009 U.S. App. LEXIS 22729 (4th Cir. Oct. 16, 2009), the Fourth

Circuit assessed materiality by looking at how undisclosed exculpatory evidence would have affected the verdict had it been used at trial. There, the Fourth Circuit concluded that a witness' undisclosed criminal history would not have affected the verdict, because even without use of that exculpatory evidence, the jury had already been informed about the witness' status as a felon. *Id.* at *4-5. Exactly as *Brady* requires, the Fourth Circuit answered the materiality question by assessing how use of withheld evidence would have changed the trial, the very type of analysis the Sixth Circuit eschewed here.

Likewise, in *Libberton v. Ryan*, 2009 U.S. App. LEXIS 21633 (9th Cir. Oct. 2, 2009), the Ninth Circuit assessed *Brady* materiality by determining how the jury would have reacted to withheld evidence which it did not hear and concluded that "even had [the jury] known" of a witness' alleged deal with the prosecution, there was no reasonable probability the outcome of the trial would have been different. *Id.* at *38-39. Again, faithfully applying *Brady*'s materiality standard, the appeals court properly assessed the effect that the withheld evidence would have had upon the verdict, had such evidence been presented to the jury.

Each of these recent Court of Appeals' decisions highlights three critical points: (1) Just as this Court has repeatedly held, *Brady*'s materiality standard requires assessment of how a verdict would have been different *had exculpatory evidence been presented to the jury*; (2) The other Courts of Appeals are faithfully applying *Brady*'s materiality standard; and (3) The

Sixth Circuit's materiality analysis in Ms. Owens's case bears no semblance to the materiality standard repeatedly articulated by this Court.

The Sixth Circuit's materiality standard is, as Judge Merritt rightly recognizes, "nonsense." Pet. App. 58. Indeed, the Sixth Circuit has concluded that the prosecution was entitled to withhold sexually explicit, salacious love letters, because Ms. Owens "could have" tried to provide inferential evidence about Ron Owens's affair by testifying herself, producing an anonymous letter about the alleged affair, or calling the paramour to the stand to admit her immorality. Pet. App. 37-38. *Brady* materiality analysis is exactly the opposite: It merely requires that a petitioner show what she would have had *with* the admittedly withheld, exculpatory evidence. Where, as here, a petitioner does not have in her possession specific exculpatory evidence, *Brady*'s materiality analysis only asks how the withheld evidence – not some other evidence – could have been used at trial.

The proper question, therefore, is what Ms. Owens *could have done with the love letters* at trial. It is clear that she could have presented them to the jury to show the true mitigating motive for the killing, and to show that the prosecution's argument for death was not true. There is a reasonable probability that one juror who read those letters would have imposed a life sentence. Gaile Owens was entitled to send those very letters to the jury as exculpatory, mitigating evidence. An anonymous letter, a wife's suspicions, and a paramour's denial are – and were –

no substitute for the due process guarantee that the prosecution disclose these exculpatory documents which the prosecution instead *deliberately withheld* in order to distort the truthfinding process.

Unlike the other circuits, the Sixth Circuit has employed a materiality analysis that distorts *Brady* beyond recognition. Because intervening decisions of the Courts of Appeals make manifest that the Sixth Circuit's analysis is both wrong and in conflict with the standards applied in the other circuits, this Court should indeed grant certiorari and reverse the judgment below. The petition for rehearing should be granted.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

MARK E. OLIVE
Counsel of Record
LAW OFFICE OF MARK E. OLIVE, P.A.
320 W. Jefferson Street
Tallahassee, Florida 32301
(850) 224-0004

KELLEY J. HENRY
Supervisory Assistant Federal
Public Defender
GRETCHEN L. SWIFT
Assistant Federal Public Defender

OFFICE OF THE FEDERAL
PUBLIC DEFENDER
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

CERTIFICATION

The foregoing petition for rehearing is presented in good faith and not for the purpose of delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

Mark E. Olive